



Chapter I

Developing a Meaningful Tribal Consultation Policy

Consultation is an enhanced form of communication that emphasizes trust, respect and shared responsibility. It is an open and free exchange of information and opinion among parties, that leads to mutual understanding and comprehension. Consultation is integral to a deliberative process that results in effective collaboration and informed decision making.

—Secretary Donna E. Shalala

HHS' efforts to establish a meaningful tribal consultation policy – one that is institutionalized throughout the Department and a part of its decision-making process – stem from President Clinton's April 1994 Memorandum to the heads of executive departments and agencies entitled, "Government-to-Government Relations with Native American Tribal Governments." The Memorandum reaffirms the unique and firmly established legal relationship that has long existed between tribal governments and the federal government, affirmed in treaties, the U.S. Constitution, federal statutes, court decisions, Executive Branch policies, as well as in moral and ethical considerations. It goes on "to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes" and to direct each federal department and agency to honor this relationship by consulting to the greatest extent practicable and to the extent permitted by law with

tribal governments prior to taking actions that will affect [them]."

Consequently, the White House Domestic Policy Council (DPC) convened an interagency working group, chaired by the Secretary of the Interior, which requested that each Department develop its own operational definition of "consultation" with American Indian and Alaska Native Tribes. The working group determined that a uniform Administration-wide policy was not desirable, given the different organizational structures, statutory considerations, and administrative processes among federal departments and agencies.

At the same time, Dr. Phillip Lee, then HHS' Assistant Secretary for Health, and Dr. Michael Trujillo, Director, Indian Health Service (IHS), held a series of regional meetings with tribal leaders on national health care reform and on the health care reforms being initiated by state governments. Those meetings provided an unprecedented opportunity to bring together tribal leaders, urban Indian programs, state government representatives, and officials from HHS' Health Care Financing Administration, Indian Health Service, Office for Civil Rights, and the Department of Interior's Bureau of Indian Affairs to discuss health care reform issues common to the Tribes. In all, six regional forums were held across the country in 1995.

Following up on the Lee-Trujillo meetings and based on the findings of the DPC working group, Secretary Shalala in August 1997 formally established the Department's tribal consultation policy in a memorandum entitled, "Department Policy on Consultation with American Indian/Alaska Native Tribes and Indian Organizations." In it the Secretary endorsed the Department-wide consultation plan, which was developed by the HHS Working Group on Consultations with American Indians and Alaska Natives, and further directed all HHS operating divisions to draft agency-specific plans that would be based on the Department's definition of consultation.

In addition, the Secretary recommended that the Department:

1. Consult with Indian people to the greatest practicable extent and to the extent permitted by law before taking actions that affect these governments and people;
2. Assist states in the development and implementation of mechanisms for consultation with their respective tribal governments and Indian organizations before taking actions that affect these governments and/or the Indian people residing within their state. Consultation should be conducted in a meaningful manner that is consistent with the definition of "consultation" as defined in this policy including reporting to the appropriate HHS agency on its findings, and on the results of the consultation process that was utilized;
3. Assess the impact of this Department's plans, projects, programs and activities on tribal and other available resources;
4. Remove any procedural impediments to working directly with tribal governments or Indian people; and
5. Work collaboratively with other federal agencies in these efforts.

In that same memorandum, the Secretary placed overall responsibility for managing the Department's consultation obligations in the Office of Intergovernmental Affairs (IGA), an important step, given that IGA is the focal point in the Office of the Secretary for the Department's communications with states and local governments. Among its other responsibilities, IGA would serve as a "single point-of-contact that can provide AI/AN representatives with access to Departmental program information and assistance."

In addition, the Secretary directed each HHS agency to draft tribal consultation plans that would be based on the principles stated above, but also would consider the unique missions and structures of each agency. HHS agencies, following tribal consultations, have written and finalized their tribal consultation plans. Although these plans are in final form and are being implemented by the respective agencies, they are "living" documents that may be revised as necessary. The HHS consultation plans can be found in Appendix 3 of this report.

As a first major step in fulfilling the Department's consultation obligations, Deputy Secretary Kevin Thurm and IHS Director Michael Trujillo, M.D. held five regional Listening Councils with tribal leaders in 1998 and 1999. Representatives of Indian organizations and urban Indian health providers were also in attendance. At the Listening Councils, tribal leaders were invited to raise issues and concerns related to HHS policies and programs. In sum, the Listening Councils' aim was to obtain tribal leaders' input on this question:

What do we need to do together, the federal government and tribal governments, to help bring the promise of health, well being and opportunity to American Indians and Alaska Natives?

At the National Tribal Consultation Forum held in Washington, D.C. on July 19-20, 2000, HHS responded to this question as well as to the individual issues raised at the Listening Councils. Although some questions remain unanswered, the Department is committed to continuing the dialogue with tribal leaders and providing additional feedback. Indeed, one objective of this report is to ensure that the Department and tribal leaders keep track of the numerous issues that have been raised at our consultation meetings and avoid having to begin anew at future meetings.

Another important step the Department has taken, in accordance with its consultation policy, has been the holding of its annual tribal budget consultation meeting chaired by the Assistant Secretary for Management and Budget (ASMB). Held first in May 1999 and again in April 2000, ASMB convened these meetings before the Department's agencies submitted their annual appropriations requests to the Secretary.

The impact of the Department consultations with tribal leaders and, in particular, the budget consultations, has been reflected in the Department's annual budgets and its policies. For example, since 1995, the IHS budget has increased 41 percent, leading to more clinical services, more mental health services, more dental visits, and more health care for elders on reservations. In FY 2001, the Centers for Disease Control and Prevention and the National Institutes of Health will invest \$615 million in diabetes research and prevention. In 1999, the Health Care Financing Administration announced that it would exempt American Indian and Alaskan Native children from cost sharing under the State Child Health Insurance Program (SCHIP), thereby removing a significant barrier in enrollment.

The Administration's and the Department's tribal consultation policies will and must evolve as the needs of the tribes and the government-to-government relationship changes. The most recent development was President Clinton's issuance on November 6, 2000 of Executive Order 13175 entitled, "Consultation and Coordination with Indian Tribal Governments." In releasing the Executive Order, President Clinton stated:

Today, there is nothing more important in federal-tribal relations than fostering true government-to-government relations to empower American Indians and Alaska Natives to improve their own lives, the lives of their children, and the generations to come. We must continue to engage in a partnership, so that the First Americans can reach their full potential. So, in our nation's relations with Indian tribes, our first principle must be to respect the right of American Indians and Alaska Natives to self-determination.

Under the leadership of Secretary Shalala and Deputy Secretary Kevin Thurm, HHS has worked hard to comply with both the letter and the spirit of these words. Nonetheless, as suggested in chapters II and III of this volume, having engaged in an intense dialogue with our tribal partners, we know that many issues remain unresolved and many needs unmet.